ANDOLL LTD. v. KOREA INDUSTRY CO. LTD. & ORS.

[O.C.J. (Lai Kew Chai J.) May 5, 1987]

[Singapore – Motion in Suit No. 2498 of 1986]

Contract – Sale and purchase of low speed diesel oil – Goods tendered not as specified – Gross misrepresentation bordering on fraud – Injunction restraining issuing bank of letter of credit from paying out.

Banking law – Letter of credit opened by plaintiffs for goods supplied by 1st defendants – Letter of credit issued by 2nd defendants – Fraud on the part of 1st defendants on goods tendered – Injunction against 2nd defendants from paying out – Whether injunction should continue – Exception of fraud – Application to discharge injunction.

By a contract the plaintiffs agreed to buy and the first defendants agreed to sell certain quantity of "Low speed diesel oil (Gas Oil)" with the flash point C at guaranteed 98 minimum, at a fixed price per barrel CIF Bangkok. Payment was to be made by the plaintiffs causing a letter of credit to be opened in favour of the first defendants. As requested by the plaintiffs, the second defendants, Banque Paribas, opened a letter of credit for US$928,000 in favour of the first defendants. When the shipment was tendered for delivery in Bangkok it was found, as the plaintiffs claimed on evidence, that the oil tendered was certainly not low speed oil but oil which could be classified as fuel oil or a blend of fuel oil and crude oil. Concluding that there was "gross misrepresentation bordering on fraud," the plaintiffs contended that the first defendants were not entitled to payment. The plaintiffs obtained an interim injunction restraining Banque Paribas from paying out under the letter of credit until after the hearing of the plaintiffs' motion to continue the injunction or until further order.

The first defendants applied for the discharge of the injunction or, under prayer 3, for the plaintiffs to put up security to the satisfaction of the court to fortify their undertaking as to damages. Banque Paribas took a neutral stand in the matter.

Held: (1) the state of evidence on the nature of the goods tendered in Bangkok and the circumstances were such as to bring this within the exception of fraud as an exception under which an issuing bank may be restrained from paying under a letter of credit as discussed in *United City Merchants (Investments) Ltd.* v. *Royal Bank of Canada*(2);

(2) order granted in terms of the plaintiffs' motion to continue with the injunction on their usual undertaking as to damages;

(3) first defendants' application dismissed, except prayer 3.

Cases referred to:

(1) *Sztejn* v. *J. Henry Schroder Banking Corporation* (1941) 31 N.Y.S. 2d. 631.

(2) *United City Merchants (Investments) Ltd.* v. *Royal Bank of Canada* [1983] 1 A.C. 168.

APPLICATIONS.

G. Raman for the plaintiffs.

Kenneth Tan for the 1st defendants.

Ms. Molly Lim for the 2nd defendants.

Cur. Adv. Vult

Lai Kew Chai J.: By a contract as evidenced in an exchange of telexes, the plaintiffs agreed to buy and the first defendants agreed to sell 10,000 metric tons plus or minus 10% Sellers' option (later amended to 6,000 metric tons) of "Low Speed diesel oil (Gas Oil)" with the flash point C at guaranteed 98 minimum. The price was fixed at US$22 per barrel CIF Bangkok, Thailand. Payment was to be made by the plaintiffs causing a letter of credit to be opened in favour of the first defendants. Delivery was to be made in one cargo lot by the first defendants during February 1986 by motor tanker "Na Mu Hu" or substitute.

In the event, the second defendants ("Banque Paribas") at the request of the plaintiffs opened a letter of credit for US$928,000 in favour of the first defendants. When the shipment was tendered for delivery in Bangkok, it was found, as the plaintiffs claimed on evidence I shall allude to in greater detail later, that the oil tendered was certainly not low speed diesel oil but oil which could be classified as fuel oil or a blend of fuel oil and crude oil. Concluding that there was "gross misrepresentation bordering on fraud," the plaintiffs contended that the first defendants were not entitled to be paid and that accordingly Banque Paribas which had agreed to pay to a bank nominated by the first defendants by a certain date should be restrained from doing so. The plaintiffs obtained an interim injunction from the High Court restraining Banque Paribas from paying out under the letter of credit until after the hearing of the plaintiffs' motion to continue the injunction or until further order.

On the day the first defendants entered their appearance, they filed a Summons in Chambers entered as No. 3894 of 1986 seeking orders in terms of the following prayers so far as they are material:

"1. . . .

2. That the *ex parte* order dated March 26, 1986 obtained by the plaintiffs herein, restraining the 2nd defendants, Banque Paribas of Singapore from paying or effecting payment through the agents or servant any sum of money to

the 1st Defendants in this action under L/C No. IL 202649 dated 14.2.86 arranged by the plaintiffs in favour of the 1st defendants be discharged.

3. Alternatively that unless the plaintiffs herein forthwith put up security to the satisfaction of the Court to fortify their undertaking as to damages, the said *ex parte* order be discharged.

4. That the plaintiffs herein indemnify the 1st defendants or pay damages to the 1st defendants in respect of all losses suffered by the 1st Defendants as a result of the said *ex parte* order and that such indemnity or damages be referred to the Registrar for quantification.

5. . . . ."

The plaintiffs' motion and the abovementioned application of the first defendants were heard by me together. At the hearing, Banque Paribas through their counsel stated that they were taking a neutral stand in the matter. I was also told that the matters before me were directly related to the matters raised in another suit in the High Court, Suit No. 2523 of 1986 in which the sub-buyers, namely Wanda Trading Co. Pte. Ltd., of the plaintiffs had instituted proceedings against the plaintiffs to rescind their contract of sub-purchase and for a declaration that the back to back letter of credit opened at the request of Wanda Trading Co. Pte. Ltd. was null and void. In that action, Wanda Trading Co. Pte. Ltd. had also obtained an interim injunction against another bank, Banque Nationale de Paris, from paying out under the relevant letter of credit. In dealing with the plaintiffs' motion to continue the injunctions and the first defendants' application for an order to set aside the interim injunctions, I was referred to the affidavits filed in Suit No. 2523 of 1986. After hearing the parties, I made an order in terms of the plaintiffs' motion to continue with the injunction on their usual undertaking as to damages. As for the costs they were ordered to be costs in the cause. With regard to the first defendants' application under Summons in Chambers No. 3894 of 1986, I dismissed the application except for Prayer 3 in respect of which the first defendants were given leave to restore after filing a further affidavit. I now give my reasons.

In the course of arguments counsel for the plaintiffs, Mr. G. Raman, pointedly claimed that a fraud had been perpetrated against the plaintiffs by the first defendants who had presented documents purporting to evidence the shipment of diesel when in truth and in fact sludge or light fuel oil with flash point from 97 to 57 degrees were shipped and tendered in Bangkok. At this stage I did not have to find nor would I be entitled to find that the first defendants had perpetrated a fraud against the plaintiffs. I was, however, satisfied from comparing the contract sample and the sample taken of the goods found on board the vessel that the latter was clearly murky and black; that from the inspection by the end buyers in Bangkok and from the results of the independent surveys carried out there were substantial evidence that sludge was in truth and in fact tendered as diesel oil which, if proved, would constitute a fraud on the plaintiffs. I was satisfied that sufficiently grave cause had been shown by the plaintiffs why Banque Paribas, who were duly appraised of the evidence adduced in these interlocutory proceedings, should be restrained from accepting the documents tendered and since fraud would vitiate all, I felt that I should follow what Shientag J. said in the famous American case of *Sztejn* v. *J Henry Schroder Banking Corporation*[1] as follows:

"In such a situation, where the seller's fraud has been called to the bank's attention before the drafts and documents have been presented for payment, the principle of the independence of the bank's obligation under the letter of credit should not be extended to protect the unscrupulous seller."

The state of the evidence on the nature of the goods tendered in Bangkok and the circumstances were such as to bring this case within the exception of fraud as an exception under which an issuing bank may be restrained from paying under a letter of credit as discussed in *United City Merchants (Investments) Ltd.* v. *Royal Bank of Canada.*[2] Those being my views on the matters raised in the Motion, it inevitably followed that I dismissed the first defendants' application except in respect of prayer 3 as stated earlier.

Order accordingly.

Solicitors: *G. Raman & Partners; Drew & Napier; Freshfields.*